

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RACHEL HEUR)	
Claimant)	
)	
VS.)	
)	
CAMBRIDGE PLACE)	
Respondent)	Docket No. 1,032,858
)	
AND)	
)	
KANSAS HEALTHCARE ASSOC.)	
WC INSURANCE TRUST)	
Insurance Carrier)	

ORDER

Respondent requested review of the January 11, 2008 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on April 8, 2008.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 25 percent permanent partial impairment to the whole body¹ based upon the opinions of Dr. Travis Oller. Respondent has appealed this Award

¹ All ratings referenced in this Order are to the body as a whole.

arguing that the ALJ improperly relied upon portions of the *Guides*² which were not placed into evidence. And if that evidence is not considered, respondent contends the Award should be modified to a 13 percent impairment as assigned by the claimant's treating physician, Dr. John Ciccarelli.

Claimant contends that even if the ALJ considered those portions of the *Guides* that were admittedly outside the record, his conclusion as to claimant's impairment is sound and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The parties do not dispute the underlying facts or compensability of claimant's injury. Rather, the sole dispute stems from the nature and extent of her resulting impairment and the ALJ's rationale and methodology in arriving at that figure.

The ALJ concluded that claimant suffered a 25 percent permanent impairment, specifically adopting the findings and opinions expressed by Dr. Oller over those expressed by Dr. Ciccarelli and Dr. Lynn Curtis. In support of his finding, he cited specific references to portions of the *Guides* that were not in evidence nor were they referred to by any of the testifying physicians. The ALJ took judicial notice of the entire edition of the *Guides*³.

Respondent takes issue with this methodology asserting that "[t]he court simply plucked this language out of the guides without any basis for the same in the evidentiary record."⁴ And in doing so, he assigned an impairment (25 percent) that is not supported by the record and in respondent's view, that finding should be modified to reflect the 13 percent assigned by Dr. Ciccarelli, the treating physician.

The primary difference between each of the opinions of the testifying physicians stems from their interpretation of the x-rays and how that interpretation is used to support a conclusion as to whether the claimant has a loss of motion segment integrity in her spine. If that finding, is significant enough, the *Guides* authorize a higher DRE classification. Dr. Oller testified that he reviewed the x-rays and found 6 mm of movement which qualifies claimant for a DRE V impairment (25 percent). On the other hand, Dr. Ciccarelli reviewed

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted. (*Guides*).

³ ALJ Award (Jan. 11, 2008) at 1.

⁴ Respondent's Brief at 2 (filed Feb. 13, 2008).

the same x-rays and found the translation (movement) to be something less and qualified for something in between a DRE II and III, ultimately assigning a 13 percent. But Dr. Ciccarelli conceded that he did not take actual measurements but “eyeballed” the x-rays in coming to this conclusion.

Dr. Curtis did not rate claimant’s impairment in terms of her motion segment integrity. Rather, he concluded that she’s suffered from multilevel instability as a result of her decompressing spine and that in his view she qualified for a DRE IV which translates to 20 percent. Later in his deposition he was asked to rate her condition based upon the range of motion model also available in the *Guides*. After some review of the records, he concluded that she sustained a 17 percent permanent impairment based upon that methodology.

The Board has considered the parties’ arguments and the record as a whole and concludes the Award should be modified to reflect a 17 percent permanent partial impairment to the whole body. This is based upon Dr. Curtis’ opinion as to claimant’s impairment based upon the range of motion model. It appears from the record that there is a lack of agreement amongst the physicians as to the extent of claimant’s loss of motion segment integrity as well as the method used to establish that loss and what DRE category should then be assigned. Whereas, there is no dispute as to Dr. Curtis’ range of motion assessment of claimant’s impairment. And after considering all of the medical testimony, the Board finds it is more persuaded by Dr. Curtis’ assessment of 17 percent. Thus, the Award should be modified from 25 percent to 17 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 11, 2008, is modified to reflect a 17 percent permanent partial impairment to the whole body.

The claimant is entitled to 21.86 weeks of temporary total disability compensation at the rate of \$214.79 per week or \$4,695.31 followed by 69.38 weeks of permanent partial disability compensation at the rate of \$214.79 per week or \$14,902.13 for a 17 percent permanent partial impairment, making a total award of \$19,597.44.

As of April 30, 2008 there would be due and owing to the claimant 21.86 weeks of temporary total disability compensation at the rate of \$214.79 per week in the sum of \$4,695.31 plus 69.38 weeks of permanent partial disability compensation at the rate of \$214.79 per week in the sum of \$14,902.13 for a total due and owing of \$19,597.44, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge